

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SUSAN JINKS, :

4 Petitioner :

5 v. : No. 02-258

6 RICHLAND COUNTY, SOUTH :

7 CAROLINA. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 5, 2003

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:27 a.m.

14 APPEARANCES:

15 ROBERT S. PECK, ESQ., Washington, D.C.; on behalf of the
16 Petitioner.

17 JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as Intervenor.

20 ANDREW F. LINDEMANN, ESQ., Columbia, South Carolina; on
21 behalf of the Respondent.

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6	On behalf of the United States,	
7	as Intervenor	15
8	ANDREW F. LINDEMANN, ESQ.	
9	On behalf of the Respondent	18
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1 P R O C E E D I N G S

2 (11:27 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 02-258, Susan Jinks v. Richland County.

5 Mr. Peck.

6 ORAL ARGUMENT OF ROBERT S. PECK

7 ON BEHALF OF THE PETITIONER

8 MR. PECK: Mr. Chief Justice, and may it please
9 the Court:

10 In enacting section 1367, Congress took up this
11 Court's invitation in Finley to manage the boundaries of
12 supplemental jurisdiction. It had two goals in doing so.
13 It sought to provide a Federal forum for the plaintiffs
14 that so chose to use it, and for -- for reasons of respect
15 for the interests of comity and federalism, it provided a
16 mechanism by which those cases may be returned to State
17 court.

18 They knew that there was a dilemma, a dilemma
19 caused by the operation of statutes of limitations, and so
20 they sought to find and found a simple, practical,
21 workable solution that traveled down a well-trod path.
22 It's a path that was traveled down by the Soldier and
23 Sailors' Relief Act, a act that also tolls State statutes
24 of limitations even when exigent circumstances do not
25 exist. And in the case in 1993 holding that, Conroy, this

1 Court found that it was applicable in that instance to a
2 defendant who was a town.

3 It also traveled down that road in section 108
4 of the Bankruptcy Act. This too provides that kind of 30-
5 day window after dismissal of the automatic stay or
6 lifting of the automatic stay for a plaintiff to file an
7 action which is otherwise purely a State matter in State
8 court.

9 This Court found in *Stewart v. Kahn* that there
10 is no federalism bar to congressional authority as long as
11 that authority exists someplace in the Constitution.
12 Throughout its history, pursuant to Article I, which has a
13 cognate provision duplicative of the authority it derives
14 also from Article III, Congress has used its jurisdiction-
15 setting authority as a traffic cop over the area of
16 concurrent State and Federal jurisdiction. It has done so
17 almost from the beginning in the Anti-Injunction Act, the
18 removal statute, and has always found this to be a
19 necessary incident of maintaining a dual-court system.

20 QUESTION: Well, the Anti-Injunction Act just
21 applies to Federal courts, doesn't it?

22 MR. PECK: The -- it gives Federal courts the
23 authority, though, to stay a State action when it
24 interferes with the jurisdiction of the Federal court.

25 QUESTION: It's an -- that -- that's an

1 exception to the Anti-Injunction Act.

2 MR. PECK: That's an exception contained in the
3 Anti-Injunction Act, and another exception is when an act
4 of Congress so provides.

5 The choice of tolling did not attempt to give
6 longer life in State court than it would have enjoyed in
7 Federal court. It did not eliminate defenses that were
8 available in Federal court, have the matter remain there.
9 It did not change the State's policy on waiver of
10 municipal liability or alter its statute of limitations.
11 It simply said that the case, as it stood in Federal
12 court, is now available to be heard in State court. The
13 State is free to change both its waiver of immunity, its
14 statute of limitations, and Congress accepts those changes
15 regardless of the application of the supplemental
16 jurisdiction statute.

17 Once that jurisdiction attaches, once the
18 Federal court has authority to hear the State action, then
19 even after the Federal -- Federal claim has fallen away,
20 the court still has the jurisdiction to hear what
21 otherwise would have been a purely State claim.

22 This is unusual in a diversity case. When
23 complete diversity is broken, the jurisdiction ends. But
24 here no one, not the Supreme Court of South Carolina, not
25 the respondents, not the amici, questioned Congress'

1 authority to say that this remains a Federal matter
2 because a Federal interest has attached because the matter
3 has now been heard.

4 QUESTION: I didn't understand it that way, but
5 South Carolina said, Federal court, you want to take this
6 and deal with this stale claim? That's all right with us.
7 It's one of the ironies of the case that the State's
8 position is the Federal court can have it if you keep it.
9 The only thing they can't do is give it back to us when we
10 don't want it because that would be commandeering the use
11 of our courts. South Carolina's position is the Federal
12 court can keep our State claim in Federal court. Indeed,
13 it must if it wants the claim to remain alive.

14 MR. PECK: That -- that is correct, and even at
15 this late date, rule 60(b) would enable a plaintiff like
16 Susan Jinks to seek to reopen that Federal case, to -- to
17 reconsider its judgment and allow this case to still live
18 if -- if the tolling provision is ineffective.

19 So here what we're saying is that there's a
20 continuing Federal interest in this matter. There's --
21 there's been a Federal attachment to what otherwise would
22 have been a purely State matter. In a removal situation,
23 for example, South Carolina could not refuse a remand and
24 we contend that that authority which is contained in the
25 removal statute is the same kind of authority that

1 Congress is exercising here because what Congress has
2 effectively done is define the legal effect of the
3 appearance of this matter in Federal court and the Federal
4 disposition of it. And the State courts of South Carolina
5 or any other State is not equipped, it's not authorized to
6 refuse that definition because Congress is the supreme
7 sovereign of Federal law. So --

8 QUESTION: We -- we know what Congress has --
9 has -- has defined. Why is it important? I mean, what is
10 the -- how would you define the important interest to the
11 Federal courts in -- in our seeing the constitutional
12 issue your way?

13 MR. PECK: Well, first of all, Congress wanted
14 to provide this Federal forum. They clearly had the
15 authority to do that. But they also wanted to take in the
16 interest of comity which this Court has always referred to
17 as a vital consideration.

18 QUESTION: The State says, we don't want this
19 kind of comity. Keep it.

20 MR. PECK: It's -- it's very nice for the State
21 to have that interest, but the federalist design of our
22 Constitution provides that impetus that Congress was
23 acting on.

24 QUESTION: No, but I -- I want to get down to
25 specifically what's important to the Federal courts and to

1 Congress.

2 MR. PECK: Well --

3 QUESTION: Why would it hurt the Federal courts
4 if you lose this case? What's -- practically what's --
5 what's at stake?

6 MR. PECK: I -- I think there are -- there are
7 several things that might happen. Right now what we call
8 supplemental jurisdiction is a doctrine of discretion. It
9 would be turned into a doctrine of plaintiffs' rights,
10 that if the State courts are refusing to receive these
11 case -- cases, then the Federal courts will be obligated
12 to hear these State matters even if they were novel and
13 complex matters in which only the State courts have the
14 appropriate expertise to hear it. And I think that would
15 cause some problems.

16 QUESTION: What difference does complexity make
17 if the State Federal court's position is we don't want to
18 clutter up Federal courts with a lot of State tort --
19 garden variety, simple State tort claims? We don't want
20 to be a fender bender court.

21 MR. PECK: And I think it is perfectly
22 legitimate in Congress' jurisdiction-setting authority for
23 them to make that determination. These are matters that
24 are --

25 QUESTION: The -- the idea is that Federal

1 courts should be occupied with Federal cases and not with
2 State cases.

3 MR. PECK: And I -- I think that is an
4 appropriate -- appropriate reason for Congress to adopt
5 this kind of a statute to assure that that happens.

6 The other -- Justice Souter, the other possible
7 consequence is that plaintiffs, fearful that a Federal
8 court will not hear their matter, will not take it back if
9 the -- the State courts will not accept the matter, may be
10 left without a cause of action on their State claim, that
11 they will suddenly be shut out the door. And in order
12 to --

13 QUESTION: And how is that going to hurt the
14 Federal courts?

15 MR. PECK: That does not necessarily hurt the
16 Federal courts, but Congress certainly has a right to be
17 concerned for those litigants and try to --

18 QUESTION: Why -- why isn't the person to be
19 concerned for those litigants the State courts under whose
20 law the litigants want to sue?

21 MR. PECK: Because -- because, Justice Souter,
22 here the State courts have -- have -- Congress has
23 basically done one thing. They've -- they've looked at
24 the idea of comity that this Court had talked about in
25 Guaranty Trust, in Ragan, and -- and what they said is

1 that comity is a reciprocal process. It's got to have a
2 two-way street.

3 And so what we're doing is we're not giving
4 longer life in Federal court to what's in State court. We
5 have the authority to assign to the State courts a matter
6 that is purely Federal in nature. Now we have a matter
7 that has a Federal interest because of the intervention of
8 its arrival in Federal court, and because of that, we have
9 enough authority also to say that this is a matter that
10 the State courts can't refuse. They can't suddenly say
11 that we do not recognize the authority here --

12 QUESTION: But comity is traditionally a matter
13 of consent rather than having one sovereign impress its --
14 its law on the other. I mean, it's consensual.

15 MR. PECK: It is consensual, but then again, the
16 -- the idea behind comity is tied up with our -- our
17 federalism and our idea that we have a dual court system.
18 That dual court system recognizes that there will be
19 conflicts. There will be some -- some difficulties
20 between the Federal and State systems. Those difficulties
21 is what Congress is trying to police.

22 It's a -- it's a function that they have
23 performed repeatedly, and the removal statute is a very
24 good example of that. And certainly Congress could insist
25 -- could insist that the State courts receive back even a

1 matter that the Federal court erroneously dismissed rather
2 than remand it.

3 And here they're not asking the South Carolina
4 courts to do anything that they don't normally do. If a
5 -- a matter is --

6 QUESTION: Well, they're asking the South
7 Carolina courts to grant relief in a case that is outside
8 the statute of limitations. I take it they don't -- the
9 South Carolina courts don't normally do that.

10 MR. PECK: South Carolina courts, as -- as we
11 cited in the -- the Hilton Head and Moriarty decisions,
12 has said that they will sometimes waive the statute of
13 limitations in the interest of justice.

14 Another instance in which they waive that issue
15 is when venue has been misapplied. When -- when they
16 demand that venue be placed in one particular place, you
17 file in that wrong place, the statute of limitations
18 expires before that court acts on it, they say it has
19 jurisdiction to transfer it to the proper venue.

20 QUESTION: Well, would this case come out
21 differently in the State? Supposing Georgia, a
22 neighboring State, had no such waiver. Would this case
23 come out differently there?

24 MR. PECK: I don't think so, and the reason I
25 don't think so is because when all that is left in the

1 Federal court is a matter that is otherwise a State-based
2 claim, that Federal court sits as just another court of
3 that jurisdiction, another court within that State's
4 system. And for that reason -- for that reason, it ought
5 to be treated, when Congress so authorizes -- and
6 Congress, exercising that Article III, that necessary and
7 proper powers that it had, utilizing the Supremacy Clause,
8 authorizes that this be treated essentially by tolling as
9 meeting the statute of limitations.

10 They have the right to define the meaning of
11 what the Federal law is here, and that is simply what
12 they've done. They've done it by adopting a tolling
13 provision that is not unlike other tolling provisions
14 throughout the law. And here it's clear that they --
15 they've done something that they have the authority to do.

16 Tolling comports completely with the federalist
17 design of the Constitution, enables the court's
18 consideration of what court is best positioned to
19 adjudicate. That is decidedly a jurisdictional decision.
20 Here -- and it's -- and it -- it is doing that by allowing
21 the courts to control their own borders of what is
22 appropriate to them and what is not.

23 QUESTION: I thought the South Carolina Supreme
24 Court agreed that as far as the Federal courts are
25 concerned, this is all fine. So it was necessary to spare

1 the Federal courts having to sit on a case that no longer
2 has a Federal element. That's fine. It serves a
3 legitimate Federal purpose.

4 But, says South Carolina, you can't -- it isn't
5 proper to tell us then -- they can dump it. That's fine.
6 They can't tell us that we have to pick it up.

7 MR. PECK: That is indeed what they've said.
8 But Stewart v. Kahn says otherwise.

9 QUESTION: That was a -- that was a Civil War
10 tolling of the statute of limitations.

11 MR. PECK: That is correct. It found that
12 within the war power, Congress had the authority to toll
13 the statute of limitations in a State action brought in
14 State court. Obviously then there is no Tenth Amendment
15 overlay that prevents the use of that war powers
16 authority.

17 Here they have similar authority, both in
18 Article I, section 8, to establish the inferior courts, as
19 well as Article III where there's a cognate phrase, and
20 that authority has to be equivalent. They've used that
21 authority also with respect to bankruptcy, again deriving
22 from section 8.

23 And so here again there's no question that these
24 other tolling provisions have been properly used. No one
25 has questioned their constitutionality in recent times,

1 and this simply adopts a longstanding congressional
2 approach to this issue. It's one that this Court has
3 previously approved.

4 If -- if the respondent has his way, enormous
5 mischief will result. You leave the courts with a
6 Hobbesian choice, a choice that they have been
7 uncomfortable with in which you've seen courts granting
8 motions for reconsideration, courts requiring waivers of a
9 statute of limitations, so having much the same effect --
10 and clearly when tolling does that, it is clearly
11 appropriate to the judicial power -- and in other
12 instances, simply holding onto a case they would otherwise
13 allow the State courts to do, again in the interest of the
14 federalist overlay --

15 QUESTION: Well -- well, isn't it -- if --
16 suppose you should not prevail here. Well, then you just
17 bring -- the plaintiff would bring two actions, bring --
18 bring a protective action in the State court within the
19 statute of limitations and then that would solve the
20 problem, wouldn't it?

21 MR. PECK: But that -- that's an unworkable
22 solution. Congress sought to avoid that. Congress wanted
23 to give a Federal forum capable of hearing all matters
24 that a plaintiff would expect a single court to hear. And
25 by filing a protective action of that sort, first of all,

1 you could not stop the State court from continuing to
2 proceed, possibly eclipsing in speed the Federal court and
3 coming up with res judicata on their Federal claim, as
4 well as the fact that you may be signaling the Federal
5 court that on the State matter we have a preference to be
6 in State court when that really isn't the case.

7 I -- I would -- if there are no further
8 questions, I would like to reserve the rest of my time.

9 QUESTION: Very well, Mr. Peck.

10 Mr. Lamken, we'll hear from you.

11 ORAL ARGUMENT OF JEFFREY A. LAMKEN

12 ON BEHALF OF THE UNITED STATES, AS INTERVENOR

13 MR. LAMKEN: Mr. Chief Justice, and may it
14 please the Court:

15 The tolling provision at issue here is within
16 Congress' constitutional powers for two reasons.

17 First, it establishes the legal effect of a
18 distinctly Federal set of events: the filing, pendency,
19 and dismissal of an action in Federal court over a
20 defendant over whom the court can exercise jurisdiction.

21 Second, it serves legitimate Federal interests,
22 ensuring that if plaintiffs are held harmless for having
23 selected a Federal forum in the first instance and
24 ensuring that Federal courts are not required to exercise
25 jurisdiction and decide cases that involve potentially

1 sensitive issues of State law that are more reliably and
2 more appropriately decided in the State court.

3 Because municipalities are not States or arms of
4 the States, sovereign immunity does not prevent them from
5 being haled into Federal court and it doesn't prevent the
6 Federal courts from exercising jurisdiction over cases
7 against them, including supplemental State law claims.

8 Congress can establish the rules for when
9 Federal courts should hear such claims and the rules for
10 when they should not. Congress has corresponding
11 authority to establish reasonable rules about the legal
12 consequences of the pendency of the Federal action, of the
13 filing of the claim, its pendency, and the court's
14 decision to dismiss it under specified rules that Congress
15 itself has established.

16 The rule established here falls within the
17 tradition of Federal control over the effect of Federal
18 proceedings. It falls in the tradition of, for example,
19 legal effect of the filing of a bankruptcy petition which
20 stays all the actions that are against the debtor and
21 tolls the State limitations periods during the pendency of
22 the automatic stay.

23 Or the removal provision which takes cases out
24 of State courts, stays the proceedings in State courts,
25 and thus prevents the State courts from proceeding in a

1 way such as by deeming the case constructively dismissed
2 that might have the effect of causing the statute of
3 limitations to continue to run.

4 And the effect of a Federal -- a judgment of a
5 Federal court case.

6 All these are matters that are controlled by
7 Federal law, and that Federal law is no less binding on
8 State courts adjudicating State causes of action,
9 including against municipalities, than they are on Federal
10 courts.

11 The rule in this case serves twin Federal
12 interests.

13 First, it holds plaintiffs harmless for having
14 selected a forum -- a State -- excuse me -- a Federal
15 rather than a State forum in the first instance. Absent
16 this sort of rule, plaintiffs would face the risk, if they
17 chose a Federal forum, of having the statute of
18 limitations run on their State law claims. If the Federal
19 court then chose to dismiss, those State law claims would
20 be barred. And plaintiffs would have an artificial
21 incentive to avoid Federal court, including for the
22 assertion of their Federal law claims.

23 It also serves the interests of Federal courts
24 in ensuring that they don't have to decide State law
25 claims that are potentially sensitive, that under the

1 standards this Court articulated in Gibbs that Congress
2 has codified in section 1367(c) and it reflects sensible
3 notions of division between State and Federal authority
4 more appropriately belong in State court and can be more
5 reliably adjudicated there.

6 This Court's decision in Stewart v. Kahn
7 establishes that there is no constitutional impediment to
8 congressional preemption of State tolling rules if it
9 serves a legitimate Federal interest, the tolling
10 provision here, like the social -- excuse me -- like the
11 Soldiers' and Sailors' Relief Act, the bankruptcy
12 automatic stay tolling rule, following that tradition.

13 Finally, the tolling rule here intrudes only
14 modestly on State interests. The timely filing of the
15 State claims in Federal court serves all of the statute of
16 limitations purposes as the claim -- as the timely filing
17 of those same claims in State court.

18 Accordingly, we ask that the judgment of the
19 State supreme court be reversed.

20 If there are no further questions.

21 QUESTION: Thank you, Mr. Lamken.

22 Mr. Lindemann, we'll hear from you.

23 ORAL ARGUMENT OF ANDREW F. LINDEMANN

24 ON BEHALF OF THE RESPONDENT

25 MR. LINDEMANN: Mr. Chief Justice, and may it

1 please the Court:

2 By enacting section 1367(d), Congress has
3 intruded on principles of State sovereignty. This case
4 involves more than just the tolling of a State law statute
5 of limitations. It involves, in this particular instance
6 where a political subdivision is involved and South
7 Carolina law is involved, specifically the South Carolina
8 Tort Claims Act -- this case involves a -- a waiver of
9 State law sovereign immunity, State law governmental
10 immunity.

11 QUESTION: What about examples cited by the
12 representative of the Solicitor General of the Soldiers'
13 and Sailors' Civil Relief Act and other Federal laws that
14 have a similar effect on South Carolina and other States?

15 MR. LINDEMANN: Well, I would submit to the
16 Court that, first of all, the issue has never come up,
17 never been litigated in this Court, and as far as I'm
18 aware, has never been litigated in any court whether or
19 not the Soldiers' and Sailors' Act in any application is
20 -- is constitutional.

21 QUESTION: Okay. So you think, as far as you're
22 concerned, it would be the same problem and the same
23 result.

24 MR. LINDEMANN: No, I do not necessarily believe
25 it will be the same result. I believe it would be a much

1 more difficult question for this Court than what was
2 facing the South Carolina Supreme Court and is presently
3 before this Court.

4 QUESTION: Why?

5 MR. LINDEMANN: Because you have different
6 Federal interests that are involved. And obviously, in
7 determining whether or not the -- a statute is proper
8 under the Necessary and Proper Clause and to do a Tenth
9 Amendment analysis, you have to look at -- you have to
10 weigh the various Federal and State interests that are
11 involved.

12 In this particular case, which I'll elaborate
13 more momentarily, you have very superficial, I would
14 submit, Federal interests involved compared to a very
15 substantial State interest of determining whether or not
16 the State and its political subdivisions are subject to
17 suit under State law.

18 QUESTION: But is it not -- is it not correct --
19 is it not correct that the intrusion on State sovereignty
20 -- forget the Federal side of the balance for a moment --
21 the intrusion on State sovereignty is precisely the same
22 under all these other statutes?

23 MR. LINDEMANN: I would disagree, Justice
24 Stevens.

25 QUESTION: Why is the intrusion in the Soldiers'

1 and Sailors' Civil Relief Act any different than this one?

2 MR. LINDEMANN: The Soldiers' and Sailors' Act
3 -- it would be a very similar intrusion on the -- on the
4 State sovereignty.

5 QUESTION: And how about the bankruptcy statute?

6 MR. LINDEMANN: The bankruptcy -- the actual --
7 any -- any of these statutes that have been cited by the
8 petitioners and by the Government that actually provide
9 for a stay of a State court action I think are
10 substantially different because I would submit to the
11 Court that a stay of a State court action, whether it's
12 pursuant to the Bankruptcy Code, pursuant to the removal
13 statutes, any of -- Anti-Injunction Act, any of those does
14 not have the same effect upon State sovereignty because
15 it's not changing the actual liability of the defendant,
16 in this particular case, Richland --

17 QUESTION: Well, neither does this statute
18 change the liability. It just preserves the cause of
19 action.

20 MR. LINDEMANN: I --

21 QUESTION: Just like the Soldiers' and Sailors'
22 statute.

23 MR. LINDEMANN: I -- I would respectfully
24 disagree, Justice Stevens, because what has occurred in
25 this particular case is Richland County was entitled to

1 State law sovereign immunity once 2 years passed from the
2 date of the loss. And at -- at the point that this
3 lawsuit was filed in State court --

4 QUESTION: Wouldn't it be entitled to sovereign
5 immunity if a sailor had -- had sued them too?

6 MR. LINDEMANN: Well, that's why I was trying to
7 distinguish the stay cases from the Soldiers' and Sailors'
8 Act. I think the Soldiers' and Sailors' Act issue is a
9 much closer question and there what you're weighing is
10 much more substantial Federal interests.

11 QUESTION: I'm -- I'm just looking at it from
12 the State's point of view in the point of my questions.
13 It did not seem to me that the State interest in it being
14 immune was any different in any of those situations.

15 MR. LINDEMANN: Well, I would -- I would submit
16 that there is no difference in the Soldiers' and Sailors'
17 context, but there would be a major difference in any of
18 the situations involving a stay.

19 QUESTION: Mr. Lindemann, I don't -- I don't see
20 what difference it makes that the statute of limitations
21 in this case was applied to -- to what you call State
22 sovereign immunity. That is, you -- you acknowledge that
23 this entity, Richmond -- Richland County, was -- was not
24 entitled to sovereign immunity as we know it under Federal
25 law.

1 MR. LINDEMANN: That's correct, Your Honor.

2 QUESTION: But you're saying that the State
3 wished to confer upon Richland County a shorter statute of
4 limitations for suit against it than -- than this Federal
5 statute permits.

6 Why is that any -- any different from applying
7 the same statute against South Carolina's determination
8 that a private individual should not be suable after 2
9 years? What difference does it make whether -- whether
10 the person being affected by it is a private individual or
11 Richland County? So long as it's not the State of South
12 Carolina, Federal sovereign immunity law is not -- is not
13 at issue. What do we care?

14 MR. LINDEMANN: Well this, Your Honor, is not a
15 case involving the Eleventh Amendment.`

16 QUESTION: Exactly.

17 MR. LINDEMANN: This is not a case that is
18 involving Federal constitutional immunity.

19 QUESTION: Exactly.

20 MR. LINDEMANN: This is a case that was brought
21 -- a negligence case that was brought in State court
22 against a State governmental -- or a local governmental
23 entity in the State of South Carolina to which South
24 Carolina law should apply. And the reason why we contend
25 that this violates the Tenth Amendment is it intrudes into

1 the areas of State sovereignty to determine, number one,
2 what South Carolina law provides; number two, how South
3 Carolina law determines whether or not their own
4 governmental entities are subject to suit.

5 QUESTION: But, Mr. Lindemann, one of the
6 curiosities about this case is if the Federal court, once
7 the Federal claim dropped out, decided that it would clean
8 -- clean up the operation, it would keep it in Federal
9 court, there would be a Federal court adjudicating South
10 Carolina's State law case. The only regulating rules
11 would be State rules. And South Carolina says, that's
12 okay with us. They can take our law into the Federal
13 court and apply it there and -- but we don't want it back.
14 In other words, we want to force our cases to be litigated
15 into -- in the Federal court. And that doesn't make a
16 whole lot of sense.

17 MR. LINDEMANN: Well, it's not as much that
18 they're trying to force the Federal court to litigate the
19 case. Obviously, the plaintiff chose that forum to start
20 with. And Congress has deemed -- has provided for
21 supplemental jurisdiction. So obviously Congress has
22 provided a forum in Federal court for the litigation of
23 these State law claims. And so South Carolina has not
24 said, you can't give it back to us, but what South
25 Carolina had said is that in the interim, if there's a

1 dismissal without prejudice of the State law claims in
2 another court, whether it be the Federal district court or
3 whether it be in a court of another State, if there's a
4 dismissal without prejudice under South Carolina law,
5 that's considered as if the suit had never been brought in
6 the first place.

7 QUESTION: In other words, you're saying it's
8 all right with us if the Federal court adjudicates this
9 purely State claim. The State isn't offended by that, but
10 it is offended by getting it back even though everyone had
11 notice in ample time within the -- the county had ample
12 notice because they received a Federal summons and
13 complaint. So there was no question of -- of repose
14 involved.

15 But there's one -- another aspect of this, it
16 seems to me, passing strange. Are you suggesting that the
17 removal statute would be vulnerable to a similar attack?
18 Because that's really -- if you're talking about State
19 court, this is wrenching a case out of the State court,
20 ousting the State court of jurisdiction, putting it into
21 the Federal court. I would think if you're right about
22 sending it back, then you'd certainly object to lifting it
23 out.

24 MR. LINDEMANN: I don't believe the interest
25 here is that South Carolina has a problem with -- with the

1 Federal court deciding issues of State law, and I don't
2 think South Carolina has a problem with deciding those
3 issues itself. The problem South Carolina has in this
4 particular case is with Congress expanding upon State law
5 that actually set the boundaries as to when and how a
6 political subdivision can be sued.

7 QUESTION: What difference does it make whether
8 it's a political subdivision or not? Suppose South
9 Carolina law said, gas stations shall be immune from suit
10 except that you can sue them within two years, and then
11 the same situation occurs. Would -- would not the Federal
12 court be intruding upon South Carolina's decision of
13 immunity just as much?

14 MR. LINDEMANN: South -- yes, the Congress would
15 be intruding upon --

16 QUESTION: So -- so --

17 MR. LINDEMANN: -- the ability of the State of
18 South Carolina to set a statute of limitations for private
19 defendants.

20 QUESTION: That's -- and that's all we're
21 talking about, to set a statute of limitations whether
22 it's for private defendants or whether it's for Richland
23 County which, as far as Federal law is concerned, is a
24 private defendant, or whether it's for gas stations.

25 I mean, I -- you -- you try to make something

1 different of this case by saying what it involves in -- is
2 Richland County, but what we, the Federal courts, say is
3 Richland County is not the State of South Carolina. It is
4 not a State entity, and as far as we're concerned, it's a
5 gas station.

6 MR. LINDEMANN: But I would submit to the Court
7 two points in response to that. It goes beyond because
8 it's a governmental entity and you look at the application
9 of State law because again, this is a State law case
10 brought and adjudicated in a State court. And you look at
11 the State law which actually provides a greater defense
12 for a governmental entity than it does for a private
13 citizen.

14 To give the Court an illustration --

15 QUESTION: You would have no`--

16 QUESTION: You give greater defenses for gas
17 stations. Would -- would that change the gas station case
18 simply because you give greater defenses to gas stations?

19 MR. LINDEMANN: No, it would not change the
20 case.

21 QUESTION: Of course not.

22 MR. LINDEMANN: My point is it -- it actually
23 makes a stronger case to show the intrusion on State
24 sovereignty where you have a political subdivision.

25 And if I may illustrate. Prior to 1985, South

1 Carolina recognized absolute sovereign immunity for its
2 State entities as well as its political subdivisions. And
3 if you looked at -- the question that comes to mind is
4 whether Congress, prior to 1985, could have enacted a
5 statute that subjects Richland County, a political
6 subdivision in the State of South Carolina, to a claim for
7 negligence in the operation of its local detention center
8 where South Carolina law itself provides there is no such
9 claim because of sovereign immunity.

10 QUESTION: The answer is, of course, they could
11 if they had a -- if there was a basis in the Constitution
12 for the Federal Government to pass a law that changes
13 State law. They do it every day of the week.

14 And so usually what you ask is, is there a basis
15 here? Of course, there is. They say Article III.

16 Indeed, was there a problem Congress was trying
17 to cure? Indeed, there is. It was the mess that existed
18 before the statute.

19 Is there an infringement of what the State would
20 like to do? Of course, there is but the Constitution
21 gives the power to the Federal Government to do that.

22 Now -- now, what's -- that -- like, you know,
23 purely I'd say hornbook. So what -- what is the -- what
24 is the special thing about this infringement of the
25 State's power to do what it would like to do here?

1 MR. LINDEMANN: I respectfully disagree with
2 you, Justice Breyer. If, prior to 1985, Congress wanted
3 to create a situation where Richland County would be
4 liable for the operation of its detention center, it would
5 have to do so in the context of a Federal cause of action
6 which obviously existed at that time under section 1983.
7 What I'm saying is --

8 QUESTION: So Congress in your opinion doesn't
9 have the power to -- to interfere with State law insofar
10 as it creates State laws of action? Congress couldn't
11 pass tort reform, for example.

12 MR. LINDEMANN: Well, I believe tort reform in
13 certain instances would be permissible. I -- I believe
14 that -- and certainly the -- the precedent set by this
15 Court supports this -- that Congress has the authority
16 through preemption and through its properly enacted
17 statutes to limit the liability in State court actions --
18 in State law actions, but cannot create liability where
19 none existed previously. And I'd submit to the Court that
20 I'm not aware of any single example where Congress has
21 stepped in and created a statute that creates a -- a State
22 law cause of action or expands upon a State law cause of
23 action to create liability where none existed.

24 QUESTION: Except the Soldiers' and Sailors'
25 Relief Act, for example.

1 MR. LINDEMANN: Well, and the Soldiers' and
2 Sailors' Relief Act, if it is indeed constitutional, is
3 based upon a different weighing of the Federal interest
4 versus the State interest. You obviously in that case
5 have much greater Federal interest involved than the
6 simple convenience to litigants to have to be able to be
7 -- have the ability to file your Federal and State claims
8 in the same Federal action without concern that your State
9 action might ultimately be dismissed after the statute of
10 limitations ran.

11 Obviously the Soldiers' and Sailors' Act
12 involves First Amendment war powers. It involves issues
13 of national defense and deployment of armed services
14 around the country where they're not available to -- where
15 they don't have the immediate availability of access to
16 our court system. Those are much different rights, much
17 different Federal interests, and would create a much
18 different issue. And how this Court would ultimately
19 resolve that issue I cannot say, but it would certainly
20 make a much stronger case for allowing that than the
21 simple case that is -- or the Federal interests that are
22 at stake in this particular instance.

23 The --

24 QUESTION: If we went back to the old ways, is
25 there any unconstitutionality in one of the things that

1 was done? And the Federal judge will say, yeah, this is
2 really State business, but I'm not going to subject the
3 plaintiff to a time bar. So, defendant, Richland County,
4 any defendant, will you agree that you will waive the
5 statute of limitations should I dismiss this case without
6 prejudice. The -- the -- the State -- the county
7 certainly could do that.

8 MR. LINDEMANN: That -- that happened frequently
9 prior to 1990, and I'm actually aware of -- personally of
10 instances even since 1990 where that's been the case --

11 QUESTION: And how about bringing --

12 MR. LINDEMANN: -- and that obviously is the
13 solution.

14 QUESTION: A plaintiff brings a protective
15 action and says, I really want this 1983 claim to be the
16 front runner, but if I fail on that, I want to have these
17 garden variety State -- whatever it is -- assault cases.
18 So the plaintiff begins a State -- a case in State court
19 and the State tort claims, the Federal case, including the
20 1983 claim.

21 MR. LINDEMANN: That's right.

22 QUESTION: Then that would be perfectly all
23 right.

24 MR. LINDEMANN: That would be perfectly all
25 right, and in fact --

1 QUESTION: And all that accomplishes is having
2 two cases instead of one, which is if -- if that can be
3 avoided, it's -- for the efficiency of the system, it's a
4 pretty good idea, isn't it?

5 MR. LINDEMANN: But realistically looking at the
6 way 1367(d) operates anyway is you often do have two
7 separate lawsuits such as what we have in this particular
8 instance.

9 QUESTION: But that's 1367(d) was meant to
10 overcome I thought, having two lawsuits going on, just to
11 have the -- the State court sitting there and nothing
12 happening in the event that the Federal court should
13 dismiss the Federal claim and there's a live lawsuit to
14 pick up.

15 MR. LINDEMANN: There are many different
16 alternatives that courts dealt with this issue prior to
17 1990. And in fact, I'd submit that there's certainly no
18 authority to support any finding or any conclusion that
19 litigants' due process rights were violated before 1367(d)
20 was enacted.

21 QUESTION: No. It wasn't necessary to
22 litigants. It's just that your solution to the problem
23 permits the two parties who want to try their case in
24 Federal court to confer a jurisdiction on the Federal
25 court that the district judge believes it doesn't have and

1 doesn't want.

2 MR. LINDEMANN: Well, and -- and that is true.

3 QUESTION: So from a point of view of protecting
4 the State, I guess Congress dived into this mess. I -- I
5 wrote an opinion. You might -- to recall it to mind, it
6 happened to involve a plagiarism. Did you read -- I had a
7 1st Circuit case. It involved plagiarism of an Icelandic
8 poet called Franjen Gendulik.

9 (Laughter.)

10 MR. LINDEMANN: I'm not aware of that --

11 QUESTION: And in that -- you're not aware of
12 that. Well, if you don't -- that doesn't call it to
13 mind --

14 QUESTION: It was made into a movie, wasn't it?

15 (Laughter.)

16 QUESTION: But the poem was Suze Sine Razmut
17 Nogot.

18 In any case, the -- the point was at the end of
19 that it seemed like a terrible mess. There seemed like
20 five solutions. Each of them had something to be said for
21 it, and so Congress went in to legislate in order to deal
22 with this procedural mess.

23 Now -- now, why isn't that a legitimate interest
24 just as legitimate as the interest in protecting soldiers
25 and sailors, the interest that underlies lots of other

1 Federal legislation?

2 MR. LINDEMANN: Well, I would submit to Your
3 Honor that that is certainly not a very substantial
4 Federal interest to the extent it is a Federal interest.

5 QUESTION: To deal with a problem of unfairness
6 to States, unfairness to litigants, try to have a uniform
7 rule?

8 MR. LINDEMANN: Well, I don't believe it -- it
9 creates unfairness necessary to litigants, and there are
10 obviously solutions around it -- and was dealt with by --
11 many courts dealt with this particular issue prior to
12 1990. And I would submit that when you balance that
13 Federal interest with the State interests that are
14 involved here and -- which is obviously what -- what's the
15 analysis under the Tenth Amendment, that the result should
16 be that the State interests involved to be able to control
17 State law and State law claims, to be able to control when
18 and how State -- States and their political subdivisions
19 are subject to suit under State law, that those interests
20 far outweigh the Federal interest. Obviously it is a
21 balancing problem.

22 QUESTION: Isn't -- isn't one of the questions
23 who should do the balancing? Should we do it or should
24 Congress do it?

25 MR. LINDEMANN: Well --

1 QUESTION: Doesn't Congress normally make this
2 kind of policy decision?

3 MR. LINDEMANN: Well, I believe in this --

4 QUESTION: And the branch of the Federal
5 Government that makes this kind of policy decision.

6 MR. LINDEMANN: Well, there -- there's clearly
7 no -- no legislative history that suggests that Congress
8 made that particular balancing. In fact, there's nothing
9 in the legislative history --

10 QUESTION: No, but I assume the State of South
11 Carolina was represented in Congress at the time they made
12 that decision and could be -- could raise all these
13 objections in that forum.

14 MR. LINDEMANN: Well, I would submit to the
15 Court that just as this Court ruled in the Raygor case
16 last term in the Tenth Amendment context, just like in the
17 Eleventh Amendment context --

18 QUESTION: The Eleventh Amendment was really
19 implicated there.

20 MR. LINDEMANN: -- you have to look at whether
21 or not there's a clear statement that Congress intended to
22 affect Federal-State relations such as it did.

23 QUESTION: No, but I think the clear statement
24 rule is limited to States, and of course, counties are not
25 considered the same as States.

1 MR. LINDEMANN: Well, I would -- I would submit
2 to the Court that if -- if Your Honor is suggesting that
3 only comes into play in Eleventh Amendment cases, that --
4 that -- I would disagree with that because Gregory versus
5 Ashcroft was a Tenth Amendment case and this Court ruled
6 based upon the clear statement rule.

7 Now, whether or not a party has standing to
8 assert --

9 QUESTION: Was that -- was that a -- an
10 immunity --

11 QUESTION: That was State officials.

12 QUESTION: -- official -- an officer immunity
13 case?

14 MR. LINDEMANN: That was a case. It was a -- a
15 ADEA case, Your Honor, looking at the qualifications of
16 State judges in the State of Missouri.

17 QUESTION: But the difference is that the State
18 is not amenable to suit in Federal court. The
19 municipality is just like any other corporation. So --

20 MR. LINDEMANN: I don't disagree with that.
21 That's why we are not pursuing this matter under the
22 Eleventh Amendment. However, a municipality has standing
23 to assert a challenge under the Tenth Amendment, and this
24 Court in the Printz case, Printz v. United States, was
25 actually --

1 QUESTION: It's not a kind of jurisdictional
2 challenge. I mean, the State -- if the State were sued in
3 Federal court and there was a pending claim, the State
4 would say you -- we don't fit under 1367(a), and the State
5 is not there at all. But here this claim is properly
6 brought in Federal court against the city. Is that right?

7 MR. LINDEMANN: That -- that's correct, Your
8 Honor.

9 QUESTION: So it seems to me there's a very
10 large difference in that respect.

11 MR. LINDEMANN: We -- we are certainly not
12 arguing that 1367(d) is unconstitutional as applied to --
13 I mean, (a) is unconstitutional as applied to Richland
14 County. What we're arguing is that the expansion of the
15 State law statute of limitations and the limited waiver of
16 sovereign immunity under State law is what, as applied in
17 this particular case, violates the Tenth Amendment.

18 QUESTION: I can see in the abstract what your
19 argument is, but in the concrete, let's take the removal
20 case. So there's a case lodged in State court. It's
21 lifted up, put into Federal court, and then more than 2
22 years later, it gets remanded. Practically what's the
23 difference in terms of South Carolina and its concern with
24 stale claims between those two cases?

25 MR. LINDEMANN: Well, Your Honor, obviously a

1 removal situation is substantially different in that
2 jurisdiction was first lodged in the State court, and as a
3 result, any type of waiver issue or any type of statute of
4 limitations issue would be resolved by the fact that there
5 was a initial filing of the State court claim in the State
6 court.

7 QUESTION: But functionally I don't see any
8 significant difference if the concern is we don't want
9 stale claims. We don't want to adjudicate claims that
10 have been hanging around more than two years. In my case,
11 yes, you touched base in Federal -- in State court. What
12 you got was what you got in Federal court, that is, notice
13 that the plaintiff is suing arising out of this particular
14 episode. I don't see practically any difference if the
15 State's -- the State is trying to protect its concern for
16 adjudicating stale claims. The claim is still stale when
17 it comes back from the Federal court.

18 MR. LINDEMANN: It's not so -- as Your Honor
19 pointed out earlier, it's not solely an issue of repose
20 because here because the respondent, the defendant in the
21 -- in the underlying case is a governmental entity, there
22 is a aspect of State sovereign immunity that comes into
23 play that doesn't come into play in -- in the other
24 instances. And so you have the added interest of
25 preserving the right of the State in order to determine

1 whether it's going to waive its sovereign immunity, which
2 of course didn't happen until 1985, and when it does waive
3 sovereign immunity, the extent to which it's going to
4 waive it. And again, I'm referring to State law sovereign
5 immunity, not Federal constitutional immunity under the
6 Eleventh Amendment or otherwise. So what --

7 QUESTION: I understand that. I just don't
8 understand why you think we should -- we should care.

9 MR. LINDEMANN: Well --

10 QUESTION: If you're not talking about Federal
11 sovereign immunity of the State, why should we care if --
12 if the State chooses to create some other kind of
13 sovereign immunity that -- that isn't the kind that we're
14 concerned about?

15 MR. LINDEMANN: Because it goes, Your Honor, to
16 the heart of exactly what the -- the State sovereignty,
17 the interests of State sovereignty that's involved in this
18 case.

19 QUESTION: No, it doesn't. No, it doesn't. The
20 -- the essence of State sovereignty is everything covered
21 by Federal State sovereign immunity which is States and
22 agencies of States. Everything else is not central to
23 State sovereignty, whether -- whether they choose to make
24 Richland County a -- you know, give them some State
25 sovereignty protection or -- or choose to make a gas

1 station that way.

2 I don't -- I just don't understand why you
3 expect this to impress us, that the State has gone beyond
4 Federal State sovereign immunity and created some new
5 element of State sovereign immunity. I mean, they're --
6 they're free to do that, but I don't see how it invokes
7 any new doctrine under either the Eleventh Amendment or
8 the Tenth Amendment or any other provision of Federal law.

9 MR. LINDEMANN: Well, I'm not submitting that it
10 creates any type of new doctrine, Your Honor. What I'm
11 suggesting is that it's an aspect of State sovereignty for
12 a State court -- I mean, for a State legislature to
13 determine what the law is in that State that is applicable
14 purely to State law claims litigated in a State court.

15 QUESTION: Okay. Why isn't the answer then
16 necessarily the same whether we have a private litigant or
17 whether we have a -- a political subdivision? They said
18 for the private litigants, two year statute of
19 limitations. Why isn't your answer exactly the same? The
20 State was exercising the State's -- the same sovereign
21 power in each case.

22 MR. LINDEMANN: Well, I believe it would also
23 apply to a private litigant, and I didn't try to convey to
24 the Court --

25 QUESTION: Okay. I -- I hadn't understood that

1 was your position.

2 MR. LINDEMANN: What I'm trying to suggest to
3 the Court is because you have this added element of State
4 law sovereign immunity, which is created by the State
5 constitution, it makes it even a more compelling Tenth
6 Amendment --

7 QUESTION: But you don't -- you don't need it.
8 You don't need it. The private litigant doesn't have any
9 sovereign immunity rights under State law, but the private
10 litigant would be able to insist on the two-year statute
11 just the way the county is insisting on it here.

12 MR. LINDEMANN: I believe that would be the
13 case. Now, that's not the issue, obviously, before this
14 Court and that's not decided by the South Carolina Supreme
15 Court. The South Carolina Supreme Court decided this case
16 in a very limited fashion and found that 1367(d) as
17 applied to political subdivisions in South Carolina, given
18 the South Carolina Tort Claims Act and the history of
19 sovereign immunity -- State law sovereign immunity in that
20 State, that as a result, as applied to Richland County,
21 it's unconstitutional.

22 QUESTION: Suppose a judge should say -- the
23 Federal judge -- knowing South Carolina's position on this
24 question, I'll keep the case, which is now an entirely
25 State case, and I know that in diversity cases I'm

1 supposed to apply the State statute of limitations. So if
2 the Federal judge keeps this case in deference to South
3 Carolina's position that it doesn't want it, it's too
4 late, and the Federal court in a diversity case must apply
5 the State statute of limitations, when -- when does that
6 limitation begin, when South Carolina said it would if the
7 case were reinstituted there?

8 MR. LINDEMANN: No, Your Honor. I would -- I
9 would submit that the statute of limitations started to --
10 or ran from obviously the date of loss through -- through
11 for the two-year period, and if the case was filed in
12 Federal court within that two-year period, the statute of
13 limitations, as well as the -- the argument that sovereign
14 immunity applies, would not be applicable to that case.

15 But what occurred in this case is there was a
16 dismissal without prejudice of the State law claims.
17 Under South Carolina law, a dismissal with prejudice is
18 treated as if the suit was never brought in the first
19 place. And as a result, when the case was refiled in the
20 State court, it was refiled beyond the two years, at which
21 point the statute of limitations had run and at which
22 point Richland County was also entitled to absolute
23 immunity under the South Carolina Tort Claims Act.

24 And I would again submit to the Court that the
25 reason why we believe that this is a significant issue

1 under the Tenth Amendment for this case and why the
2 Eleventh Amendment jurisprudence of this Court does not
3 govern is -- is because of the importance of the State law
4 interest. And the key to this whole argument is the point
5 that this is not a Federal claim litigated in Federal
6 court. In fact, the cases that have been cited by the
7 petitioner in their briefs, the Burnett case, the Order of
8 Railroad Engineers case, all of those cases are
9 distinguishable because those are Federal causes of action
10 that are litigated in Federal court.

11 This is a State law claim that's litigated in
12 State court under purely State law, and we would submit
13 that the South Carolina General Assembly should decide
14 what is the applicable South Carolina law and that
15 Congress does not have the power under Article III and the
16 Necessary and Proper Clause to override that statement of
17 State law and to create liability where no liability
18 previously existed. And that is the key point.

19 Congress has the authority through a validly
20 enacted statute and through use of the Supremacy Clause to
21 limit liability in State actions by providing for
22 preemption, ERISA being an example, but there is no
23 example that I'm aware of where Congress has created
24 liability where none previously existed.

25 QUESTION: Thank you, Mr. Lindemann.

1 MR. LINDEMANN: Thank you, Your Honor.

2 QUESTION: Mr. Peck, you have 4 minutes
3 remaining.

4 MR. PECK: If the Court has no further
5 questions, I would ask that the Supreme Court of South
6 Carolina be reversed and would waive rebuttal.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Peck.

8 The case is submitted.

9 (Whereupon, at 12:15 p.m., the case in the
10 above-entitled matter was submitted.)

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